SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1964

NO. 509

EVVA GERTRUDE KING, *Administratrix of the Estate of Anderson J. King, Deceased,*
Defendant-Petitioner,

vs.

BLANCHE J. SIMMONS, *Administratrix of the Estate of Croner G. Simmons, Deceased,*
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The defendant-petitioner above named, respectfully petitions this Honorable Court for a Writ of Certiorari to review an opinion of the Court of Appeals for the Fourth Circuit rendered in this cause on June 10, 1964, and in connection therewith respectfully shows the following:

CITATIONS TO OPINIONS BELOW

The opinion below involving this cause is reported in 333 F. 2d 178 (4th Cir., 1964) (Appendix, page 1A); the Findings of Fact and Conclusions of Law of Judge Bell, in the United States District Court for the Eastern District of North Carolina, filed October 22, 1963, and Judgment filed on October 29, 1963, pursuant thereto, were not reported but appear in the Record filed herein. (Transcript of Record, page 1, Index to Appendix, page 67).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1), which grants this Court power to review the decisions of the Courts of Appeals by Writ of Certiorari upon petition of any party to any civil case after rendition of judgment.

It is also shown as follows:

(1) The Opinion below was filed and entered on June 10, 1964.

(2) A Petition for Rehearing was filed by Petition herein on July 8, 1964, and Order denying said Petition was filed on July 16, 1964.

QUESTIONS PRESENTED

1. May a Party Defendant be Substituted Under Former Rule 25(a), Federal Rules of Civil Procedure more than two years after the death of the original party defendant?

2. May a person be made a party in a representative capacity and may a judgment be entered against a party in a representative capacity when the record and evidence clearly reveals that such person did not in fact then hold or have such representative capacity?

3. May there be a waiver of the requirement of state law that an action against a deceased person's estate must be prosecuted against a duly appointed and acting personal representative and if so, was there any waiver in this case?

4. Did the District Court have jurisdiction over the person of Evva Gertrude King?

FEDERAL RULES OF CIVIL PROCEDURE 25(a) and 6(b) (PRIOR TO 1963 AMENDMENT and 17(b)

"Rule 25. Substitution of Parties. (a) Death. (1) If a party dies and the claim is not thereby extinguished,

the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district." Rule prior to amendment effective July 1, 1963.

"Rule 17. *Parties Plaintiff and Defendant; Capacity* (b) *Capacity to Sue or Be Sued.* The capacity of an individual other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of endorsing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sec. 754 and 959(a). As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

"Rule 6. *Time* (b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion

or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Dec. 27, 1946, effective March 19, 1948." (Rule prior to amendment effective July 1, 1963.)

STATEMENT OF THE CASE

This is an action for alleged wrongful death arising out of a collision between a delivery truck driven by one Croner G. Simmons, who was killed in the collision, and a tractor trailer driven by one Anderson J. King, now deceased, who was a resident of Florida at the time suit was instituted. The collision occurred on November 15, 1958, on U. S. Highway 301, near Benson, North Carolina. This action was originally instituted in the Superior Court of Wake County, North Carolina on December 4, 1959, and service was had on Anderson J. King, the Florida resident, under the North Carolina non-resident motorists act. In apt time the case was removed to the United States District Court for the Eastern District of North Carolina, jurisdiction in the District Court being pursuant to Title 28, U.S.C., Sec. 1441 and Title 28. U.S.C., Sec. 1332, (Diversity of Citizenship concerning a controversy exceeding the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.) The defendant denied negligence and alleged contributory negligence and filed a counterclaim.

After the action was instituted, the defendant Anderson J. King died in the State of New York, while still a resident of the State of Florida. His widow, Evva Gertrude King,

was appointed Administratrix of his estate by the Judge of the County Court of Indian River County, Florida, and after administering the estate, she filed her final returns and her petition for final discharge. The order or letters of final discharge as Administratrix was entered by the Judge of said Florida Court on April 20, 1962. The plaintiff has never moved to have her reappointed or the estate reopened.

From the date of defendant's death, only the following events transpired in the case during the two years following defendant's death:

September 11, 1960 - Defendant Anderson J. King died, (his death was not known by his attorneys until October 3, 1962.)

December 29, 1960 - Defendant Anderson J. King's attorneys gave notice of the taking of the deposition of witness Linn.

January 11, 1961 - Deposition of witness Linn taken.

December 19, 1961 - Defendant Anderson J. King's attorneys served interrogatories upon plaintiff.

December 28, 1961 - Plaintiff answered interrogatories.

April 20, 1962 - Mrs. Evva G. King was discharged as Administratrix of the Estate of Anderson J. King by the Judge of the County (Probate) Court for Indian River County, Florida. (Transcript of Record, Page 1; Page 24, Appendix)

August 23, 1962 - District Court entered an order setting a pre-trial conference.

September 11, 1962 - This date marks the expiration of the period of two years following the death of the defendant.

Thereafter, following the two year period the following events transpired.

September 18, 1962 - Pre-trial conference held by order of Court and discovery time extended. (The August 23, 1962 pre-trial order had set the time limit for discovery as of September 18, 1962, the date of the pre-trial conference. The plaintiff did not conduct any discovery proceedings during this time, and, as a matter of fact, had not, since the suit was instituted on December 4, 1959, a period of almost three years, conducted any discovery.)

September 21, 1962 - Plaintiff served Interrogatories on King's attorney.

October 3, 1962 - King's attorney obtained oral extension of time from one of plaintiff's attorneys to answer Interrogatories and mailed a written Stipulation to plaintiff's attorney concerning the extension. Later on this same day, King's attorney attempted to call King by long distance telephone at Vero Beach, Florida, and reached King's son, Mr. Andrew King and learned for the first time of the death of Anderson King more than two years before. The reasons King's attorney had not felt it necessary to attempt to communicate with King during this time are set out in his affidavit printed in the record below, and were principally because of the congested condition of the Civil calendar of the Federal Court for the Eastern District of North Carolina, which meant there had been no reason to sooner prepare for trial.

November 6, 1962 - King's attorney filed objections to Interrogatories and noted therein the death of King.

November 27, 1962 - King's attorney furnished copies of Certificate of Death and of Order of Discharge of Mrs. King as Administratrix to plaintiff's attorneys at a hearing before District Judge Preyer.

December 7, 1962 - Plaintiff moved to substitute Mrs. Evva Gertrude King, a Florida resident, as defendant, contending that she was the Administratrix of the estate of Anderson J. King, *even though plaintiff recited in her motion*

that Evva Gertrude King was discharged as Administratrix on April 20, 1962. The undersigned attorneys who had been representing Anderson J. King objected to this motion.

January 30, 1963 - Hearing before Judge Preyer on plaintiff's motion to substitute. King's attorneys appeared, objected and filed a brief in opposition to the motion.

January 31, 1963 - Judge Preyer signed an order attempting to substitute Mrs. King as defendant, and provided that defendant could appeal.

March 7, 1963 - The attorneys who had been representing Anderson J. King obtained an order from Judge Preyer providing that the certificate of appeal be dissolved, but that this order be without prejudice if the defendant desired to raise the same question if an appeal on the merits should ultimately become necessary. (This order appears in the record printed in the Court below.)

October 11, 1963 - Trial before Judge Bell. During plaintiff's presentation of evidence, a Stipulation was entered into with respect to the appointment of Mrs. King as Administratrix and the entry of the Order or letters of Final Discharge as Administratrix on April 20, 1962. At the trial the undersigned attorneys, representing Mrs. Evva Gertrude King, contended that she was not properly a party defendant and that she was not the Administratrix of Anderson J. King and moved for an involuntary dismissal.

October 22, 1963 - Opinion filed by Judge Bell.

October 29, 1963 - Judgment entered, reciting that Blanche J. Simmons, Administratrix of the Estate of Croner G. Simmons, deceased, have and recover of the defendant Evva Gertrude King, Administratrix of the Estate of Anderson J. King, deceased. the sum of $24,750.00.

This case was tried before the Honorable J. Spencer Bell, sitting without a jury, and he entered Findings of Fact and Conclusions of Law.

The Petitioner appealed to the Court of Appeals on the following grounds:

(1) There was no evidence of negligence on part of Anderson J. King.

(2) That incompetent evidence had been admitted.

(3) That the substitution of Evva Gertrude King as defendant was improper when the record showed Anderson J. King had been dead for more than two years.

(4) That the substitution of Evva Gertrude King as defendant was improper when the record showed she had been discharged as Administratrix for nine months.

(5) That the entry of a judgment against her was invalid.

(6) That the Court had no jurisdiction over her person.

Grounds (1) and (2) above were not included in the Petition for Rehearing and are not involved in this Petition for Certiorari.

On June 10, 1964, the Court of Appeals for the Fourth Circuit in its opinion affirmed the decision of the Trial Judge. Thereafter, on July 8, 1964, the Petitioner herein petitioned for a rehearing which Petition was denied on July 16, 1964.

REASONS WHY THIS PETITION SHOULD BE ALLOWED

1. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IS CONTRARY TO THE MANDATE OF RULE 25 (a), FEDERAL RULES OF CIVIL PROCEDURE, PRIOR TO THE AMENDMENT, EFFECTIVE JULY 1, 1963, AND IS IN CONFLICT WITH THE DECISION OF JUSTICE DOUGLAS, AS CIRCUIT JUSTICE, IN THE CASE OF MALONEE v. FAHEY, CA 9, 1952, 200 F. 2d 918, WHICH

DECISION HOLDS THAT ONLY THE LEGAL REPRESENTATIVE OF THE ESTATE MAY BE SUBSTITUTED UNDER RULE 25 (a) AND JUSTIFIES REVIEW AND SUPERVISION BY THIS COURT.

2. THE HOLDING OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT THAT A JUDGMENT MAY BE RENDERED AGAINST A PERSON WHO IS MERELY DESIGNATED AS THE PERSONAL REPRESENTATIVE OF A DECEASED DEFENDANT WHEN IN FACT AND ON THE RECORD SHE IS NOT SUCH PERSONAL REPRESENTATIVE, IS VIOLATIVE OF THE CONSTITUTIONAL RIGHTS OF THE ESTATE OF THE DECEASED ORIGINAL DEFENDANT AND OF THE INDIVIDUAL NAMED AS SUCH REPRESENTATIVE, WHICH REQUIRES REVIEW BY THIS COURT.

3. THE COURT DID NOT ACQUIRE JURISDICTION OVER THE PERSON OF THE DEFENDANT EVVA GERTRUDE KING, EITHER AS THE PERSONAL REPRESENTATIVE OF THE DECEASED ORIGINAL DEFENDANT OR IN HER INDIVIDUAL CAPACITY, AND THE JUDGMENT RENDERED BY THE COURT BELOW IS A NULLITY, IS VIOLATIVE OF THE RIGHTS OF THE DEFENDANT UNDER THE CONSTITUTION OF THE UNITED STATES, AND SUCH DECISION AND JUDGMENT SHOULD BE REVIEWED BY THIS COURT.

AMPLIFICATION OF REASONS WHY A WRIT OF CERTIORARI SHOULD BE ALLOWED

I.

THE MANDATORY LANGUAGE OF RULE 25 (a) (IN EFFECT AT THE TIME OF THE ATTEMPTED SUBSTITUTION) WAS NOT FOLLOWED BY THE

DISTRICT COURT WHEN IT ALLOWED SUBSTITUTION OF A DEFENDANT WHEN THE PARTY DEFENDANT HAD BEEN DEAD FOR MORE THAN TWO YEARS. (Question 1)

At the time of District Judge Preyer's order substituting Mrs. King as defendant, Anderson J. King had been dead for more than two years. Rule 25(a) of the Federal Rules then in effect (prior to the July 1, 1963 amendment) provided that if substitution of proper parties was not made within two years, ". . . the action *shall* be dismissed."

This attempted substitution was not made within two years and the action should have been dismissed under his mandatory language.

This Court passed upon Rule 25(a) prior to its amendment, in *Anderson* v. *Yungkau,* (1947) 329 US 482, 67 S. Ct. 428, 91 L.Ed. 436. In that case the Court said:

> ". . . Under the Rule, as under the statute, the settlement and distribution of the estate might be so far advanced as to warrant a denial of the motion for substitution within the two-year period. In contrast to the discretion of the court to order substitution within the two-year period is the provision of Rule 25(a) that if substitution is not made within that time the action 'shall be dismissed' as to the deceased. *The word 'shall' is ordinarily 'the language of command.' Escoe v. Zerbst,* 295 US 490, 493, 79 L.Ed. 1566, 1569, 55 S.Ct. 818. And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States, ex rel. Siegel v. Thomas,* 156 US 353, 360, 39 L.Ed. 450, 452, 15S.Ct. 378.
>
> "Thus, as stated by the Circuit Court of Appeals, Rule 25(a) operates both as a statute of limitations upon

revivor and as a mandate to the court to dismiss an action not revived within the two-year period. Rule 6(b) relates to acts required or allowed to be done by parties to an action and permits the court to afford relief to a party for his failure to act within the prescribed time limits. There would be more force in petitioner's argument if Rule 25(a) had, without more, set a two-year period within which substitution might be made. But Rule 25(a) does not stop there. It directs the court to dismiss the action if substitution has not been made within that time. *That is action required of the court, not of a party.*

". . . But it is not enough to say that if Rule 6(b) and Rule 25(a) are construed to permit substitution after the two-year period, the court need not allow it where unfairness or prejudice would result. For the normal policy of a statute of limitations is to close the door - finally, not qualifiedly or conditionally. The federal law embodied in Rule 25(a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary. Affirmed." (italics supplied)

Two things should be noted in connection with the *Yungkau* decision. First, it is noted that through no lack of diligence petitioner failed to learn of the facts until more than two years later, yet even so, the Court refused to allow substitution. The other is that at the time of the *Yungkau* decision, Rule 6(b) did not list Rule 25 as one of the matters that could not be extended by the District Court. Rule 6(b) was amended in 1946 to include Rule 25 in the list of matters in which the District Court could not enlarge the time, emphasizing the mandatory nature of Rule 25.

(See Moore's Federal Practice Civil Rules & Official Forms, Pamphlet as amended 1963, page 632.)

A further indication of the mandatory nature of Rule 25(a), in addition to the amendment to Rule 6(b), as above noted, is the fact that although, both in 1946 and again in 1955, the Advisory Committee recommended that Rule 25(a) be amended, this court did not adopt those recommendations. (The rule was amended in 1963.) (Rule 25(a) is discussed in the comments in Moore's Federal Practice, Civil Rules and Official Forms, Pamphlet, 1963, pages 763 and 764. At the time Rule 25 was amended, Rule 6(b) was also amended, in 1963.)

Since the *Yungkau* case, a number of courts have upheld the validity of Rule 25.

Hofheimer v. *McIntee*, 179 F. 2d 789

Zdanok v. Glidden Co., Durkee Famous Foods Division, 28 FRD 346 (1961)

Starnes v. *Penn. RR Co.*, 26 FRD 625 (1961), aff'd 295 F. 2d 704

Conley v. *Gibson*, 29 FRD 519 (1961)

Fleming v. Sebastiani, 161 F.2d 111

The plaintiff has relied upon *Iovino* v. *Waterson*, 274 F. 2d 41 and *Perry* v. *Allen*, 239 F. 2d 107 as authorities for substitution. However, the two cases are in conflict and not controlling because *Perry* v. *Allen*, *supra* held that Rule 25(a) was invalid, which decision is contrary to the Supreme Court's holding in the *Yungkau* case. *Iovino* v. *Waterson*, *supra* was decided on the theory of estoppel and the defendant contends that her counsel cannot in effect, change the Federal Rules nor can a so-called estoppel change the mandatory nature of the Rule.

In the *Iovino* case, the Court said: "In our view, therefore, the order of substitution can be sustained only if plaintiffs may be treated as if they had met the two-year limitation because *a Court will not allow defendant to claim*

the contrary." (italics supplied) Even if this be so, this ignores the mandatory language of Rule 25.

The question here presented is not whether the defendant is in a position to claim a right under the rule, but simply whether the Court "shall dismiss" the action where the personal representative of the deceased is not substituted within two years. *The Rule commands the court to act irrespective of any claim or act of a party.*

As a justification for not enforcing Rule 25(*a*) the Circuit Court in its opinion advanced the theory of estoppel based upon the taking of a deposition and the serving of interrogatories by defendant's counsel after but without knowledge of King's death. It is submitted that the complete answer to this reasoning is the fact that defendant's counsel's conduct cannot under North Carolina law constitute grounds for estoppel, and that the clear mandate of Rule 25(a) cannot be avoided by estoppel.

The so-called estoppel is based upon the fact that after the death of King, his counsel took one deposition and served one set of interrogatories. This amounts to penalizing defendant because his counsel prepared for trial. Under the local rules then and now in existence in the Eastern District of N. C., an attorney is required to complete discovery within 4 months after the case is at issue. It is submitted that it has always been the policy of the Federal Rules to encourage discovery procedure. Under the reasoning adopted by Judge Preyer, as shown by the order of substitution, if defendant's counsel had not prepared for trial by taking a deposition and serving interrogatories, the action would have been dismissed. Could it be reasonably said that this action constituted an estoppel under the definition of estoppel as adopted by the N. C. Court as hereinafter set out? If, under Rule 6(b), the District Court could not extend the time within which substitution could be made, surely defendant's counsel could

not extend the time by taking a deposition and serving interrogatories.

Then too, should not estoppel work both ways? This action was instituted on December 4, 1959 and thereafter the plaintiff took no steps in the case until after the pre-trial conference two years and 9½ months later. Not until September 21, 1962, did plaintiff serve interrogatories. Had these interrogatories been served sooner plaintiff would have learned of King's death. If estoppel is to apply, then plaintiff is surely estopped for failure to take any steps in the case for more than 2 years and 9½ months.

The North Carolina Court has discussed estoppel in several cases, and *In Re Will of Covington*, 252 NC 546, 114 SE 2d 257, the Court quoted from *Hawkins* v. *Finance Corporation*, 238 NC 174, 77 SE 2d 669, as follows:

> ". . . in determining whether the doctrine of estoppel applies in any given situation, the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less than the party sought to be estopped must conform to fixed standards of equity. As to these, the essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming estoppel, they are: (1) lack of knowledge and the means of knowledge of the truths as to the facts in question; (2) reliance upon

the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially." (citing cases)

Defendant's counsel had no knowledge of the death of Mr. King until late in the afternoon of October 3, 1962, as shown in his affidavit printed in the Appendix below (Transcript of Record, Page 1), and there was no effort by him to conceal the fact of Mr. King's death. There was no conduct to create any estoppel under the rules quoted above, and no action on plaintiff's part in reliance upon any conduct of defendant's counsel.

It is true that Rule 25(a) has been said to be a harsh rule, and has since been amended; but neither the deceased defendant nor his widow made the rule. The Supreme Court of the United States made the rule and it is in "the language of command" and Anderson J. King's widow is entitled to any benefit afforded by the Rule.

II.

BY ITS DECISION IN THIS CASE, THE DISTRICT COURT, SANCTIONED BY THE CIRCUIT COURT, HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW, AND HAS DEPARTED SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT THE EXERCISE OF THIS COURT'S POWER OF REVIEW AND SUPERVISION IS JUSTIFIED. (Rule 19 1(b)) (Questions 2 and 3)

(a) It is clear that from the record that at the time Judge Preyer attempted to substitute Evva Gertrude King as defendant, she had been discharged as his Administratrix by the Probate Court in Florida more than nine months prior thereto and more than seven months before plaintiff's Motion

for Substitution was filed. Once she was so discharged she had no official or representative capacity whatever and Judge Preyer's order could have no more legal effect than if he attempted to substitute any other resident of Florida. The applicable North Carolina law, revealed by the North Carolina Statutes, and by decisions of the Supreme Court of North Carolina, provides that a recovery can be had against the estate of a deceased person *only against and through the properly appointed, qualified and acting personal representative of the deceased.*

McIntyre v. *Josey*, 239 NC 109, 79 SE 2d 202 (1953)

N. C. Gen. Statute 28-172*

N. C. Gen. Statute 28-176**

Therefore, proof of the existence of a defendant and the defendant's capacity to be sued is a fundamental part of the plaintiff's case and is not a subject of waiver, at least by attorneys representing a person who is not the duly appointed and acting Administratrix. A plaintiff's proof must include evidence of the appointment and qualification and existence of a personal representative of a deceased person. Both under

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*N. C. G. S. 28-172

"*Action survives to and against representative.* - Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate."

** N. C. G. S. 28-176

"*To sue or defend in representative capacity.* - All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity."

common law pleading and code pleading, a party must allege and prove the necessary elements of a cause of action.

Citizens Bank of Marshall v. *Gahagan*, 210 NC 464 187 SE 580 (1936)

The decision in this case amounts to a holding by the District Court, sanctioned by the Court of Appeals, that it is not necessary under North Carolina law to prove that a person sued in a representative capacity is such representative, by holding that such proof was waived, and the decision thus completely negatives the statutes above referred to.

Since Evva Gertrude King had been discharged as Administratrix, Judge Preyer's order could have no more effect than if he had attempted to substitute any other resident of Florida. This does not necessarily mean that the plaintiff had no remedy. (Subject however to Rule 25 of the Federal Rules and other applicable law) The Florida law* provides that the discharge of the personal representative shall not prevent a revocation of the order of discharge or the issuance of letters of administration, if it becomes necessary or proper for any cause that further administration be had.

Florida Statutes, Sec. 734.26

In *Mallonee* v. *Fahey*, CA 9, 1952, 200 F 2d 918 the Court held that a party cannot be substituted under Rule 25 who is not the legal representative of the deceased party.

**Florida Statute* 734.26: "The final settlement of an estate and the discharge of the personal representative shall not prevent a revocation of the order of discharge or the subsequent issuance of letters testamentary or of administration if other property of the estate is discovered or if it becomes necessary or proper for any cause that further administration of the estate be had."

The Circuit Court attempts to avoid this decision by holding that the defendant waived the defendant's lack of capacity to be sued as administratrix. However, it is contended that nothing defendant's counsel did or failed to do amounted to a waiver, and that under North Carolina law, as pointed out above, this fundamental requirement of North Carolina law is not the subject of waiver.

It is clear that the defendant has always objected to the attempted substitution, and in the brief filed by defendant on that point before Judge Preyer, defendant points out that: "It would be harsh and oppressive to reopen this estate months after it was settled and closed *and the administratrix discharged.* The plaintiff had time to learn of defendant's death and to call for substitution but failed to do so. The orderly settlement of estates and the rights acquired thereunder would be adversely affected if this substitution is made. Who knows what contracts the defendant's widow may have entered into, in the belief that the property she received in the final settlement of her husband's estate was hers, free and clear of any liens or claims." Further, defendant made the objection at the trial before Judge Bell that the defendant *was not the administratrix and moved for an involuntary dismissal.*

A waiver is defined by the North Carolina court as: "An intentional relinquishment of a known right."

Jones v. *Ins. Co.*, 254 NC 407, 119 SE 2d 215 (1961)

Green v. *P. O. S. of A.*, 242 NC 78, 87 SE 2d 14 (1955)

It is abundantly clear that the defendant in this case has never intended to waive any rights, has always objected to the substitution, and still objects.

Then too, even if something was done by the substituted party that would amount to a waiver, it cannot be a waiver if that party was not authorized to act. No person who is

not the administratrix can bind an estate, either by action or by inaction, nor can his attorney.

> 21 Am. Jur., Sec. 207, Executors and Administrators, page 487.

Furthermore, Mr. Justice Douglas, as Circuit Justice, stated for the Court in the case of *Mallonee* v. *Fahey; supra, supra,* CA 9, 1952, 200 F 2d 918, that the District Court has no power under Rule 25(a) F. R. C. P. to substitute a party who is not the legal representative of the deceased party. Clearly, this lack of power under Rule 25(a) F. R. C. P. cannot be supplied by any inaction on the part of a substituted party who is not duly qualified to represent the estate or her attorney.

Where it affirmatively appears on the face of the record that there is no existing administrator, the existence of an administrator cannot be established by waiver or estoppel. The Court has, in effect, held that the defendant has waived a right merely because counsel did not formally point out the obvious fact, appearing in plaintiff's own motion, that the defendant was not the administratrix of the deceased. This should not be the law, even if counsel had not objected in person at the hearing and in the written brief filed in opposition to the motion to substitute as quoted above.

In reaching its decision the Circuit Court misinterpreted the holding in the case of *Bush* v. *Remington Rand, Inc.*, 213 F 2d 456, (2d Cir. cert. den., 348 U.S. 861 (1954)). In its opinion in this case the Circuit Court cites the *Bush case* as authority for the proposition that there had been a waiver of the right to object to the Petitioner's capacity in the present case. The *Bush case, supra, is not in point* and does not stand for the proposition for which it is cited by the Circuit Court. A reading of the *Bush case* reveals that the Court held the defendant in that case had waived his right to object to the *timely substitution* of a personal representative for a de-

ceased plaintiff. The facts clearly show that when the personal representative was substituted, the *personal representative was at that time the duly appointed and acting personal representative* of the plaintiff's estate. In the *Bush case* the Court did not hold that the Court could have substituted someone *not* a legally qualified personal representative, nor did it intimate that the defendant could waive *that* requirement under those facts.

The Respondent, in her motion to substitute the Petitioner as a defendant under Rule 25(a) of the Federal Rules of Civil Procedure, stated: " . . . wherefore, the plaintiff now moves the Court to revive this action against Evva Gertrude King, Administratrix of the Estate of Anderson J. King, Deceased (*or against some other duly appointed personal representative of the said Anderson J. King, in the event it should not prove feasible to continue this action against Evva Gertrude King*) and to substitute the said Evva Gertrude King, Administratrix of the Estate of Anderson J. King, deceased, (*or such other personal representative of the said Anderson J. King as may be duly appointed*) as a defendant herein." (italics supplied) The foregoing clearly shows that the Respondent knew she must have the Petitioner reappointed as Administratrix or have some "other duly appointed personal representative" appointed so as to have a party defendant properly substituted pursuant to the motion filed by Respondent. *The failure of the Respondent to follow through on this essential part of her case should not be charged against the Petitioner or held to be a waiver of the fundamental requirement that an estate be held liable only through a qualified personal representative.*

Finally, under Rule 17, the capacity of a person sought to be sued in a representative capacity is determined by the law of the state in which the District Court is held, in this case, North Carolina. As pointed out above, the law of North Carolina is that a *foreign* administrator has no capacity to

be sued or defend an action in his representative capacity. Therefore, there can be no recovery in this state against a *foreign* administratrix.

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Brauff v. Comr. of Rev., 251 NC 452, 111 SE 2d 620 (1959)

Cannon v. *Cannon*, 228 NC 211, 45 SE 2d 34 (1947)

(b) By its decision in this case the District Court, sanctioned by the Court of Appeals, has set a precedent that results in the interference by the Federal Courts in the orderly administration and settlement of decedents estates.

III.

THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA ACQUIRED NO JURISDICTION OF THE PERSON OF EVVA GERTRUDE KING NOR OF THE ESTATE OF ANDERSON J. KING. (Question 4)

Under the facts of this case, Evva Gertrude King was discharged and no longer was, in fact, the personal representative of Anderson J. King. Secondly, under the law of North Carolina, which is applied under Rule 17(b) of Federal Rules of Civil Procedure, Evva Gertrude King could not sue or be sued in North Carolina since, even if she were the duly qualified and acting personal representative, she had no capacity in North Carolina to represent the deceased's estate.

Cannon v. *Cannon*, *supra*

Brauff v. *Comr. of Rev.*, *Supra*

Furthermore, the incapacity of Evva Gertrude King under either of the above grounds goes to the question of jurisdiction of the Courts of North Carolina (or a Federal District Court in a Diversity case) over the person of Evva Gertrude King, an individual residing in the State of Florida.

The District Court in North Carolina had no jurisdiction over the person of Evva Gertrude King unless she were a "proper party" under Rule 25(a) to be substituted and served under the terms of said Rule. It is respectfully submitted that since she was not the personal representative when served with the notice of Motion for Substitution, the Court could not acquire jurisdiction over her person, and that her appearance and objection at the time of trial to her substitution preserved her rights. Therefore, entry of judgment against her as Administratrix was in abrogation of her constitutional right of due process of the law under the Fifth Amendment to the Federal Constitution and was likewise in abrogation of the same Constitutional right of the estate of Anderson J. King.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIS SMITH, JR.
HENRY MITCHELL, JR.
Raleigh, North Carolina
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9307.

Blanche J. Simmons, Administratrix of the Estate of Croner G. Simmons, Deceased, Appellee,

versus

Evva Gertrude King, Administratrix of the Estate of Anderson J. King, Deceased Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. J. SPENCER BELL, CIRCUIT JUDGE, SITTING BY DESIGNATION AS DISTRICT JUDGE.

(Argued April 13, 1964 Decided June 10, 1964.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BRYAN, Circuit Judges.

Willis Smith, Jr., and Henry A. Mitchell, Jr., (Smith, Leach, Anderson & Dorsett on brief) for Appellant, and John V. Hunter, III, and Howard E. Manning (Manning, Fulton, Skinner & Hunter; and Young, Moore & Henderson on brief) for Appellee.

SOBELOFF, Chief Judge:

This litigation stems from a collision between a tractor trailer driven by Anderson J. King, appellant's decedent, and a delivery truck driven by Croner G. Simmons, appellee's decedent. In the collision Simmons was killed and his widow, as administratrix of his estate, brought suit against King. Before the case was tried King died of causes unrelated to the accident and his widow, administratrix of his estate, was substituted as party-defendant. The issues pertain to the sufficiency of the evidence of negligence and the propriety of the substitution of King's widow as a party-defendant.

I

The evidence as to negligence and contributory negligence was in sharp conflict. The District Court, sitting without a jury, found as a fact that King was in his tractor trailer, southbound on Route 301, when, with the apparent intention of making a left-hand turn, he entered the northbound lane in front of the northbound truck of the plaintiff's decedent. King did not first ascertain that the movement into the northbound lane could be made with safety. There was testimony by the driver of another tractor trailer traveling southward behind King that he (the witness) was about to pass on King's left; that the witness, observing King's left-hand turn signal, returned to his (the witness') original position in the southbound lane; that during the brief interval when he was in the northbound lane he did not notice the lights of any northbound traffic. From this, the defendant argued that Simmons' lights were not burning, and that the collision was occasioned by his fault.

There was testimony, on the other hand, that after the collision the panel light switch on Simmons' delivery truck was found "pulled out" or in the "on" position for the headlights, and that the lights on the vehicle had been, according to a witness, burning an hour before the accident. The District Court resolved the conflict by accepting the plaintiff's version, and found that Simmons' lights were properly burning and that the collision resulted solely from the negligence of King.

We hold that there was adequate basis for the District Court's resolution of the disputed facts and, since it cannot be deemed clearly erroneous, we let it stand.

II

The second issue concerns the propriety of the court's allowing Mrs. King, as administratrix of her husband's estate, to be substituted as party-defendant in the place of her husband. Her contention is that, more than two years having elapsed before the plaintiff requested the substitution, the mandatory prohibition of Rule 25(a) (1), Fed.R.Civ.P., forbade such substitution and required dismissal of the suit. The pertinent portion of the rule states: "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties * * *."* The District Court concluded that the defendant was estopped to raise this objection and permitted the substitution.

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*This rule has since been revised to permit substitution within ninety days after notification of the death of a party. See 1963 Amendment to Rule 25(a)(1), Fed.R.Civ.P.

Reviewing the chronology of the case, it appears that the action was filed in the state court in December of 1959 and removed to the federal court the same month. King, the original defendant, died on September 11, 1960. Thereafter, his attorney gave notice on December 29, 1960, for the taking of a deposition of a witness on January 11, 1961. The defendant served interrogatories upon the plaintiff on December 19, 1961. A pretrial conference was held on September 18, 1962, and thereafter the plaintiff addressed interrogatories to the original defendant. The defendant's attorney replied on October 3, 1962, by requesting additional time to answer. Finally, on October 6, 1962, defense counsel learned that his client had died more than two years earlier. Within ten days after being advised of this fact by defense counsel the plaintiff moved to substitute Mrs. King, the administratrix, in place of the dead defendant.

In Iovino v. Waterson, 274 F. 2d 41 (2d Cir. 1959), *cert. denied,* 362 U. S. 949 (1960), it was held that a defendant who received service, answered the complaint, and participated in pretrial conferences without knowing of his client's death was estopped to assert the two-year limitation of Rule 25. Our case is on all fours with *Iovino.*

Moreover, the fact that Mrs. King had been relieved of her official status as an administratrix at the time of the substitution does not affect this result. The defendant made no objection to the substitution on this ground until the day of trial, approximately ten months after the substitution was originally proposed. Nor did the defendant advance this ground when he challenged the substitution or in the hearing that followed. The substitution was duly made after authorization by the District Court. The defendant's failure to voice this ground of objection until later constitutes a waiver of any

possible complaint on that ground. See *Bush* v. *Remington Rand, Inc.*, 213 F. 2d 456 (2d Cir.), *cert. denied*, 348 U. S. 861 (1954). The District Court committed no error in its ruling on this procedural point nor in allowing recovery to the plaintiff.

Affirmed